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89-1216

NO. _____

SUPREME COURT, U.S.
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In The

Supreme Court of the United States

October Term, 1989

PORT SHIP SERVICE, INC.

Petitioner,

versus

NORTON LILLY & COMPANY, INC.

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether, under federal maritime law, a vendor has the burden to discover, or a maritime agent has the burden to disclose, the identity of the agent's principal.

Whether the holding of the Fifth Circuit Court of Appeal in this case contravenes the well-established principles of the Restatement of Agency adopted by this Court, and the express holdings of the Second Circuit Court of Appeal, by impermissibly shifting the burden from the agent to the vendor.

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OPINIONS BELOW

The opinion of the United States Court of Appeal for the Fifth Circuit is reported as *Port Ship Service, Inc. v. Norton Lilly & Company, Inc.*, 883 F.2d 23 (5th Cir. 1989), and is reprinted in the Appendix commencing at App. 2. The denial of rehearing by the Court of Appeal is unpublished and is reprinted in the Appendix at App. 1. The opinion of the United States District Court for the Eastern District of Louisiana, No. 87-1924 (1988) is unpublished, and appears in the Appendix beginning at App. 6.

JURISDICTION

This Petition for a Writ of Certiorari seeks review of a judgment of the United States Court of Appeal for the Fifth Circuit on September 11, 1989, affirming a final judgment of the United States District Court of the Eastern District of Louisiana. A timely Petition for Rehearing filed in the Court of Appeal was denied on October 18, 1989. This Petition for Writ of Certiorari was filed within ninety days of October 18, 1989, as required by 28 U.S.C. § 2101(c) and Rule 20 of the Supreme Court Rules. Jurisdiction to review the judgment of the Court of Appeal is conferred on this Court by 28 U.S.C. § 1254(1) and by Rule 17.1 of the Supreme Court Rules.

I. STATEMENT OF THE CASE

A. Proceedings Below

On April 24, 1987, Port Ship Service, Inc. ("Port Ship"), a water taxi service, brought suit in admiralty, under Federal Rule of Civil Procedure 9(h), against Norton Lilly & Company, Inc. ("Norton, Lilly"), a maritime agent, for past due invoices for services rendered to various vessels from on or about February 2, 1982 through on or about March 5, 1987. Port Ship sought to hold Norton Lilly liable for these debts as the agent for undisclosed or partially disclosed principals.

After trial on the merits, Judge Marcel Livaudais entered judgment against Port Ship, filing Findings and Conclusions, and Judgment, on July 8, 1988. App. 6.

Port Ship filed a Notice of Appeal in the United States Court of Appeal for the Fifth Circuit on August 5, 1988. On September 11, 1989, the Court of Appeal issued its Opinion affirming the lower court. App. 2. Port Ship then filed a Petition for Rehearing, which was denied on October 18, 1989. App. 1.

B. Facts

Port Ship Service, Inc. is a Louisiana corporation primarily engaged in the business of providing water taxi services to and from vessels in the Port of New Orleans. Encompassed within the broad range of services provided by Port Ship are the ferrying of river pilots, the transportation of food and other supplies, the transportation of messages and the taxiing of crew members to and from vessels and the shore.

Port Ship has filed the instant suit for past due services provided to various vessels at the direction of, or for the account of, Norton Lilly & Company, Inc., a corporation primarily functioning as maritime agent. All of such services were requested, authorized or approved by the defendant and extended on the defendant's credit. Invoices for these services were billed directly to the defendant, at its request. All of these invoices were approved for payment by Norton Lilly, but were not paid by Norton Lilly on the basis that it had not been paid by its principals.

Norton Lilly was paid lump sums of money from its principals to cover the port expenses for each of the vessels for which Port Ship's invoices were incurred. However, not enough funds were apparently furnished to cover all of the expenses. Norton Lilly thus paid some bills and not others, at its discretion. Norton Lilly admitted that it always paid agency fees to itself out of these sums in priority to vendors such as Port Ship. Indeed, in some instances, it even chose to pay other water taxi services in full, and Port Ship not at all. In any case, Norton Lilly took the position that it was not personally obligated to pay for any services, since it had merely acted as an agent.

Although Port Ship was aware that the defendant was an agent, in no instance did the defendant inform Port Ship, prior to performance of the services, of the identity of the principals for whom these services were performed. Port Ship was certainly aware of the names of the vessels in respect of which the services were performed. But Port Ship did not know, and was not informed of, the identity of the responsible parties, other

than the defendant, at the time of the transactions at issue.

There are no listings available to Port Ship that reflect the names of principals whom ship agents represent, or whether a particular agent represents the owners, managers, or charterers of particular vessels. Lloyds Register of Shipping and other maritime reference books do generally disclose the names of the owners (although not always correctly and currently), but even these sources do not purport to list charterers. As it turns out, Norton Lilly's principals in most cases were charterers. In any case, one can never determine, simply from knowing the name of a ship, who the agent's principal is by resort to reference books.

As the legal argument below will demonstrate, on these facts, Norton, Lilly is liable to Port Ship for the debts of its undisclosed principals.

II. REASONS FOR GRANTING THE WRIT

A. Preliminary Statement

A writ of certiorari should issue to review the decision of the lower court for two reasons.

First, the Fifth Circuit's ruling is in direct conflict with prior rulings of the United States Supreme Court affirming the fundamental principles of agency law stated in the Restatement of Agency, including the requirement that the agent disclose unambiguously the identity of its principal or be held liable as a party to the contract.

Second, the holding of the Fifth Circuit Court of Appeal is in direct conflict with longstanding precedent in the Second Circuit Court of Appeal, in federal maritime cases, that the burden is on the agent to disclose fully its principal's identity, even when the contracting party could have obtained this information simply by inquiring of the agent.

If this case is allowed to stand as written, it will undermine well-established legal principles and may open the floodgates for agents in *all* commercial contract cases to argue that the duty is on the third party to ask, not on the agent to disclose, the identity of its principals.

B. The Decision Of The Fifth Circuit Conflicts With Prior Holdings Of This Court On An Important Question Of Federal Law.

The decision of the Fifth Circuit conflicts with the repeated holdings of this Court adopting the principles of the Restatement of Agency in matters of agency law. Indeed, this Court has upheld the application of the very agency doctrine at issue here – the partially disclosed principal rule of the Restatement of Agency (Section 321). *Dupont v. United States*, 83 F.2d 951, 953 (2nd Cir. 1936) (Swan, J.), *affirmed*, 300 U.S. 150, 57 S.Ct. 391 (1937). In *Dupont*, New York Cotton Exchange brokers (who failed to divulge the names of their principals) were held liable for payment of a stamp tax. As the Second Circuit observed:

> Ordinarily, it is true, one who acts as an agent does not become personally bound on a contract which he makes for a disclosed principal; but if he fails to divulge the name of his principal, he

> does become a party to the contract. American Law Inst. Restatement of Agency, §§ 320-322.
>
> 83 F.2d at 953.

Just recently, this Court has reiterated that it "traditionally look[s] for guidance to the Restatement of Agency." *Community for Creative Non-Violence v. Reid* ___ U.S. ___, 109 S.Ct. 2166, 2179, n. 31 (1989). *See also Commissioner of Internal Revenue v. Jessee C. Bollinger, et al.*, ___ U.S. ___, 108 S.Ct. 1173, 1179 (1988); *David Carpenter, Kenneth P. Felis, & R. Foster Winans v. United States*, 484 U.S. 19, 27, 108 S.Ct. 316, 321 (1987); *Meritor Savings Bank, FSB v. Mechelle Vinson, et al.*, 477 U.S. 57, 72, 106 S.Ct. 2399, 2408 (1986); *Margaret M. Heckler, Secretary of Health and Human Services v. Community Health Services of Crawford County, Inc., et al.*, 467 U.S. 51, 65, n. 21, 104 S.Ct. 2218, 2226, n. 21 (1984); *Raymond L. Dirks v. Securities & Exchange Commission*, 463 U.S. 646, 660, n. 20, 103 S.Ct. 3255, 3264-65, n. 20 (1983); *Kern-Limerick, Inc. v. Scurlock, Com'r of Revenues for State of Arkansas*, 347 U.S. 110, 121, n. 10, 74 S.Ct. 403, 410, n. 10 (1954); *Chicago, Milwaukee, St. Paul & Pac. R. Co., et al. v. Acme Fast Freight, Inc.*, 336 U.S. 465, 487, n. 27, 69 S.Ct. 692, 703, n. 27 (1949); *Larson v. Domestic & Foreign Commerce Corporation*, 337 U.S. 682, 689, n. 9, 69 S.Ct. 1457, 1461, n. 9 (1949), *reh'g. denied*, 338 U.S. 840, 70 S.Ct. 31 (1949).

In this case, the principles of the Restatement could not be more clear in placing the duty on the agent to disclose its principal's identity without ambiguity:

The Restatement (Second) of Agency, § 321, states:

> ***Principal Partially Disclosed***
>
> Unless otherwise agreed, a person purporting to have a contract with another for a partially disclosed principal is a party to the contract.

Comment a thereto explains:

> The inference of an understanding that the agent is a party to the contract exists unless the agent gives such complete information concerning his principal's identity that he can be readily distinguished.

Additionally, Section 4, Comment f, declares:

> If the manifestation [of identity] is ambiguous and a third person has no reason to know which of two or more principals the agent is representing, the principal is partially disclosed.

The decision of the district court below, affirmed by the Fifth Circuit, conceded that Norton Lilly did not identify its principals at the time of the transactions at issue. The district court specifically found that "[t]he agent's principal is not identified when the services are ordered and the launch ticket is prepared." App. 8. In very general terms, the district court held, however, that Port Ship might have known or been able to learn the principals' identities because:

(1) Vendors "may have independent sources," such as information about shipping line owners through past contacts or common knowledge;

(2) Vendors "might consult . . . numerous authoritative texts," such as Lloyd's Registry of Shipowners; and

(3) "Even if [it] does not have prior personal knowledge . . . a vendor is free to contact an agent," and ask its principal's identity. App. 8-9

In the Court of Appeal, Port Ship argued that the district court erred as a matter of law by shifting the burden from the agent to the vendor where the identity of the principal is unknown or at best ambiguous, and particularly in relying upon the fact that the vendor is "free to contact an agent . . . for such information." The Fifth Circuit rejected this contention, holding that the option to call the agent *is* "possibly relevant" to a finding of constructive notice. App. 4. However, under the tenets of the Restatement of Agency adopted by this Court, the option to call the agent *cannot* be a relevant factor. Yet, in this case, it is the *only* factor upon which the district court's finding of constructive notice can be based.

Although the district court set forth several other purported bases for its finding of constructive notice, all of the other factors are relevant only if the agent's principal is always a vessel owner. They are useless if, as is true here, the agent's principal can be a charterer. As far as Port Ship was concerned, all of Norton Lilly's principals could have been charterers, and from Norton Lilly's own documentation, most of them were. *See* App. 15 (Defendant's Trial Exhibit 1).

As the district court readily acknowledged, there is *no text* which even "purport[s] to provide an authoritative

listing of charterers, which would be a challenge of Sisyphean proportions."[1] Charter parties are not registered anywhere. They can be oral. They change all the time. So too, therefore, any personal (or common) knowledge of shipping line owners or any past dealings with principals is useless if the agent's principal is a charterer who can literally change from hour to hour. Moreover, the same vessel on the same voyage can have multiple agents, such as one for the owner and one for the charterer, making it even more difficult for Port Ship to ascertain the identity of a particular agent's principal in a particular instance. Indeed, the court made no finding that Port Ship did in fact have any "prior personal knowledge" of any of the specific principals at issue, nor was *any* evidence presented of such. Recognizing this, the court ultimately had to rest its opinion on the theory that "[e]ven if the vendor does not have prior personal knowledge," it can always telephone the agent. App. 8-9.

In short, the ruling in this case requires a vendor to call the agent to ascertain the identity of its principals. By holding that the option to call the agent can be a relevant factor in the constructive notice analysis, the Fifth Circuit's decision shifts the risk from the agent to the vendor, transforming a duty to disclose into a duty to

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[1] Indeed, even as to *owners*, Lloyds Register "is unable to guarantee the accuracy" of its listings. App. 16-17. As the district court found, "there have been instances when they [maritime reference sources] have been inaccurate or out-of-date." App. 9. In one such case, Port Ship attached a vessel based upon the information in Lloyds, only to be threatened with sanctions from the vessel claimant who furnished evidence of ownership by a completely different entity. App. 18-20.

inquire. This is not the law of agency, at least under the well-established principles of the Restatement of Agency adopted by this Court.

C. The Decision Of The Fifth Circuit Conflicts With Longstanding Precedent Of The Second Circuit.

In a strikingly similar case, *Orient Mid-East Lines v. Albert E. Bowen, Inc.*, 458 F.2d 572 (2d Cir. 1972), the Second Circuit expressly held that even though the plaintiff (suing for breach of an oral contract) could have easily discovered the identity of the agent's principal *by asking*, the duty was on the agent to disclose – not upon the plaintiff to inquire:

> It is probably true, as Bowen argues, that if Mulara had made inquiry, he could readily have learned the name of Bowen's principal. Conversely, we can see no good reason why Lobe should not have disclosed the name of Bowen's principal . . . . We find nothing in the records to justify an exception to the well-recognized rule that the duty is on the agent to disclose its principal and not on the contracting party to ascertain the name of the principal, even though he knows the agent is acting for another.
>
> 458 F.2d at 577.

In reaching this holding, the Second Circuit cited at length from Sections 4 and 321 of the Restatement (Second) of Agency, *id.* at 575, and followed a long line of Second Circuit precedent applying the same partially disclosed principal rules relied upon by Port Ship here. *See, e.g., Cleary Brothers v. Christie Scow Corporation*, 215 F.2d 740, 743-44 (2nd Cir. 1954); *Propstra v. Dyer*, 189 F.2d 810,

812 (2nd Cir. 1951) (Augustus N. Hand, J.); *Horan v. Hughes*, 129 F. 1005 (2nd Cir. 1903).

The district courts in the Second Circuit have applied the holding of the *Orient* case in other maritime agency cases with facts nearly identical to this case. For example, in the *Matter of Arbitration Between N.B. Stoomvaart Maatschappij "De Mass" and Woodward and Dickerson, Inc.*, 1977 A.M.C. 1941, 1943 (S.D.N.Y. 1977), the court held that the agents were liable under the "partially disclosed principal" rule where they entered into a contract with the owner of a vessel as "agents for receivers, as charterers." Although the agents were clearly representing the charterers, the court found the owner did not know, and could not easily discover from the description, the principal's actual identity. The court specifically held that "it is not the third party's duty to learn the principal's identity or name." *"De Mass"*, 1977 A.M.C. at 1943.

In another case directly on point, judgment was awarded – ironically enough – in favor of a port agent (like the defendant here) and against a ship's managing operator, acting as agent for a partially disclosed principal. *Hansen & Tidemann, Inc. v. Ionian Transport, Inc.*, 76 Civ. 3396 (slip opinion) (S.D.N.Y. Jan. 5, 1978). The district court found that the ship's operator, Ionian, contracted orally with Hansen & Tidemann ("H&T") to serve as port agent for the M/V GALAXY while the vessel was in Galveston. Although the court found that Ionian did advise H&T at the time of contracting that it was the vessel's managing agent, Ionian never disclosed for whom it was managing the vessel and told H&T to forward all bills directly to Ionian for payment.

When H&T failed to receive payment, it filed suit for collection against Ionian, who claimed that the owner, Zoe Shipping Company, was the responsible party. Relying upon the *Restatement (Second) of Agency*, §§ 4, 321, the district court held in favor of H&T on the grounds that, although H&T knew Ionian was an agent, and knew the name of the vessel, Ionian did not adequately disclose the identity of its principal.

There could surely be no case where the contracting party (itself a shipping agent) could be found more experienced in maritime affairs and more able to determine the identity of the vessel agent's principal. Still, the court in *Hansen & Tidemann* found, and properly so, that disclosure of the name of the vessel and the defendant's role as agent insufficiently disclosed the identity of its principal.

Numerous other cases and authorities testify to these same well-established principles. *See. e.g.*, 2 *Williston on Contract*, § 288 (3d ed. 1959); 1 Mecham, *Agency*, § 1412 (2d ed. 1914); Seavey, *Law of Agency*, §§ 4, 70 (1964); *Annot.*, 3 Am. Jur. 2d, § 310; *Annot.*, 150 A.L.R. 1299, 1303; and the cases collected in those works. *See also Martin v. Xarin Real Estate, Inc.*, 703 F.2d 883, 890 (5th Cir. 1983) (applying Texas law); *Intercontinental Engineering-Mfg. v. C. F. Bean*, 647 F.2d 621, 629 (5th Cir. 1981) (applying Louisiana law); *W.W. Leasing Unlimited v. Commercial Standard Title Insurance Company*, 149 Cal. App. 3d 792, 197 Cal. Rptr. 118 (Cal. 1983); *Myers-Leiber Sign Co. v. Weirich*, 2 Ariz. App. 534, 410 P.2d 491, 493 (Ariz. App. 1966); *Brown-Wright Hotel Supply Corp. v. Bajer*, 112 Ga. App. 300, 145 S.E.2d 294 (Ga. App. 1965); *Howell v. Smith*, 261 N.C. 256, 134 S.E.2d 381, 384 (N.C. 1964); *Resnick v.*

Abner B. Cohen Advertising, Inc., 104 A.2d 254, 256 (D.C. 1954); *Saco Dairy Company v. Norton*, 140 Me. 204, 35 N.E.2d 857, 858 (Me. 1944); and *Ell Dee Clothing Company, Inc. v. Marsh*, 247 N.Y. 392 (N.Y. 1928).

The Restatement and the jurisprudence also reflect the stated policy of the United States Congress. Before 1971, the *Federal Maritime Lien Act*, 46 U.S.C. § 973, put the onus on admiralty vendors to determine whether an individual ordering necessaries was authorized to do so under the terms of an existing charterparty. As the Eleventh Circuit has recently noted, however:

> Such a duty of inquiry became quite impractical in light of the various chartering and subchartering practices of foreign and domestic vessels.

Belcher Oil Co. v. M/V GARDENIA, 766 F.2d 1508, 1511 (11th Cir. 1985).

Because of such abuses, Congress amended 46 U.S.C. § 973 in 1971 to create a presumption of authority rebuttable only by affirmative action of the vendee. The purpose of this change was to:

> . . . protect terminal operators, ship chandlers, ship repairers, stevedores and other suppliers who in good faith furnish necessaries to a vessel.
>
> H.R. 92-340, 92 Cong. 1st Sess.; reprinted in 1971 U.S. Code Cong. & Ad. News 1363, at 1363.

In rem rights, of course, are complementary to an admiralty vendor's *in personam* rights. The *in personam* right established by the law of agency against a non-disclosing agent parallels the *in rem* right established by statute against a non-disclosing principal. The policy

underlying both rights is the same. Admiralty vendors cannot "perform an adequate check on the [principal] ordering the supplies." *Belcher*, 766 F.2d at 1511.

The jurisprudence has been well-summarized as follows:

> If the agent would avoid personal liability, *the duty is on him* to disclose his principal; it is *not* upon the party with whom the agent deals to discover the principal. There is *no hardship* in this rule of liability against agents who do not disclose their principal; they *always* have it in their power to relieve themselves from such liability . . . .

Annot. 3 Am. Jur. § 325, at 831 (1988) (emphasis added).

The Fifth Circuit's holding in this case works an unprecedented hardship on the vendor by shifting the burden from the agent to disclose onto the vendor to inquire and discover. This ruling directly conflicts with a long line of jurisprudence, and Second Circuit precedent in particular. Only this Court can resolve that conflict.

III. CONCLUSION

This is a classic case of "partially disclosed" principals. Port Ship serviced vessels on Norton Lilly's credit and at its request, authority or approval. Port Ship, of course, knew the names of the vessels. But Port Ship did not know and Norton Lilly did not identify the names of its principals, or even whether they were owners, charterers, or other vessel interests. The identity of Norton Lilly's principals thus could not be learned from maritime reference books. In such a situation, it is not the duty of

the third party to go further and seek to track down the identity of the principal. It is rather the duty of the agent to inform.

The lower court's ruling to the contrary conflicts with the clear principles of the Restatement of Agency, which have been repeatedly adopted by the United States Supreme Court, and conflicts with longstanding precedent in the Second Circuit Court of Appeal as well as many other courts.

The Petition for Writ of Certiorari should be **GRANTED** so that the Court may correct the error made below and resolve the conflict between the Circuits.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-3570

PORT SHIP SERVICE, INC.,

Plaintiff-Appellant,

versus

NORTON, LILLY & COMPANY, INC.,

Defendant-Appellee.

Appeal from the United States
District Court for the
Eastern District of Louisiana

ON PETITION FOR REHEARING

(Filed October 18, 1989)

Before GEE, GARZA, and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ Thomas Gibbs, Jr.
United States Circuit Judge

PORT SHIP SERVICE, INC.,

Plaintiff-Appellant,

v.

NORTON, LILLY & COMPANY, INC.

Defendant-Appellee.

No. 88-3570.

United States Court of Appeals,
Fifth Circuit.

Sept. 11, 1989.

Water taxi service appealed from an order of the United States District Court for the Eastern District of Louisiana, Marcel Livaudais, Jr., J., which rendered judgment for maritime agent in taxi service's action to recover for services rendered. The Court of Appeals held that maritime agent was not liable for services under partially disclosed principal theory.

Affirmed.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GEE, GARZA, and JONES, Circuit Judges.

PER CURIAM:

Port Ship Service, Inc. ("Port Ship") here appeals the district court's judgment that Norton, Lilly & Company, Inc. ("Norton, Lilly") had sufficiently disclosed the identity of its principal and therefore was not liable as an agent under a partially-disclosed principal theory. We affirm the judgment of the district court.

In this action, Port Ship, a water taxi service, sued Norton, Lilly, a maritime agent, and sought to hold Norton, Lilly liable for services performed for Norton, Lilly's principals. Port Ship ferries crew members, customs agents, supplies, and the like between ships and the shore at the Port of New Orleans, while Norton, Lilly acts as agent for those ships in providing husbanding services. Port Ship sued Norton, Lilly for unpaid services, alleging that Norton, Lilly, as agent, was liable for services rendered to a partially disclosed principal. That is, Port Ship knew that Norton, Lilly had a principal, but did not know the identity of that principal.

This case is controlled by a similar one decided by this court, *Port Ship Service, Inc. v. International Ship Management & Agencies Service, Inc.*, 800 F.2d 1418 (5th Cir. 1986). The *Port Ship* case involved the same plaintiff as in the present case, the same issues, and a similarly-situated defendant. In that case, we held that an agent such as Norton, Lilly is not liable for services rendered to its principal if the third party providing the services, such as Port Ship, had sufficient information to give notice of the identity of the principal. Further, that information could come from any source. *Port Ship*, 800 F.2d at 1421.

Relying on our opinion in *Port Ship*, the district court in this case made extensive factual findings as to information available to Port Ship, to determine whether that information was sufficient to give notice of Norton, Lilly's principal's identity. Finding that there was sufficient information to give notice to Port Ship, the district court entered judgment for Norton, Lilly.

Port Ship complains now on appeal that the district court erred in applying the standard set out in *Port Ship*, in that the district court wrongly gave Port Ship the duty to determine the identity of the principal, and that the evidence did not establish that the information available to Port Ship was sufficient to give notice. Because we find that the district court correctly applied the *Port Ship* standard, we defer to the district court's factual findings and affirm its judgment.

Duty of Inquiry

The Restatement (Second) of Agency § 4 makes it clear that "it is the agent's duty to disclose the principal's identity, and not a third party's duty to ascertain that identity." *Port Ship*, 800 F.2d at 1421. Port Ship now complains on appeal that the district court wrongly put that burden on it, a third party, by stating in its Findings of Fact that Norton, Lilly had twenty-four hour per day telephone service through which Port Ship could ascertain principals' identities. The district court did not, in merely setting out that fact, impermissibly shift the burden from Norton, Lilly to Port Ship. Instead, the court simply added one more fact possibly relevant to constructive notice. We therefore reject Port Ship's contention on this point.

Sufficiency of Notice

Port Ship also complains on appeal that the district court erred in relieving Norton, Lilly of liability, since Norton, Lilly did not clearly and unambiguously identify its principals, and the information supplied to Port Ship

was not sufficient to give notice of the principal's identity. Further, Port Ship complains that it had no reason to know which of several potential principals Norton, Lilly represented. As stated earlier, an agent is relieved of liability if a third party has sufficient information to constitute notice of the principal's identity. *Port Ship*, 800 F.2d at 1421. The agent is not required to identify, explicitly, its principal, and the third party may even lack actual notice. *Id*

The district court made extensive findings of fact as to the availability of sources from which Port Ship could receive constructive notice of Norton, Lilly's principal. Those sources, taken as a whole, provide sufficient notice to relieve Norton, Lilly of liability, the district court found. Because that finding is consistent with the Port Ship standard and not clearly erroneous, we AFFIRM the judgment of the trial court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

PORT SHIP SERVICE, INC.

versus

NORTON, LILLY & COMPANY, INC.

JUDGMENT

(Filed July 8, 1988)

Considering the record of these proceedings,

IT IS ORDERED that there be judgment in favor of defendants, Norton, Lilly & Company, Inc., and against plaintiff, Port Ship Service, Inc., dismissing plaintiff's suit at its costs, and, further, in favor of plaintiff and against defendant, dismissing the counter-claim, with costs.

New Orleans, Louisiana, this 8th day of July, 1988.

/s/ Marcel Livaudais
MARCEL LIVAUDAIS, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

PORT SHIP SERVICE, INC.	CIVIL ACTION
versus	NO. 87-1924
NORTON, LILLY & COMPANY, INC.	SECTION: E/6

FINDINGS AND CONCLUSIONS

Plaintiff, Port Ship Service, Inc. (hereafter "Port Ship"), is a Louisiana corporation which is primarily engaged in the business of providing water taxi services

to and from vessels that anchor in the Port of New Orleans. Defendant, Norton, Lilly & Company, Inc. (hereafter "Norton, Lilly"), is a New York corporation with its principal place of business in the State of New Jersey, which is registered to do business within the State of Louisiana. Norton, Lilly operates within this district as an agent providing husbanding services for vessels calling at the Port of New Orleans. Plaintiff seeks payment for water taxi services provided to and from vessels in the Port of New Orleans, for which Norton, Lilly acted as agent. Plaintiff rendered these services from on or about February 25, 1981 through on or about March 5, 1987, as evidenced by the invoices contained in Plaintiff's Exhibit #1. This suit was brought on April 24, 1987, under the admiralty and maritime jurisdiction of this Court. 28 U. S. C. §1333; F. R. C. P. 9(h).

FINDINGS OF FACT

At the trial of this matter to the bench, the following facts were adduced:

During the period between February 25, 1981 and March 5, 1987, Port Ship provided water taxi services to several of the vessels which Norton, Lilly represented as agent. At trial, testimony was elicited as to the customary manner of ordering water taxi services in the Port of New Orleans. The testimony reflects that the services may be ordered either by the agent, or by the person requesting the services, from any of several companies operating in the area. Oftentimes, the agent will order water taxi services for its employees to board the vessel and conduct business on behalf of its principal. It is also a common

practice for a water taxi services company to arrange with the Ship's master for a daily schedule of stops at the vessel while it remains in port, to accommodate the ship's crew. Third-parties, such as Customs officials, river pilots, and ship chandlers, arrange for their own transportation to the vessel. They order the service directly from the water taxi services company of their choice, without consulting the agent. No matter which party has ordered the service, the party which has used the service signs the launch ticket to acknowledge the service has been rendered. The invoice is then sent by the company to the agent, which verifies its authenticity and accuracy. The agent generally does this by determining that the service was performed and that the price corresponds to the published tariff. The agent then marks the invoice as "approved" and forwards it to the principal for payment. The Court finds that within the maritime arena, this "approval" is not considered to be a guarantee of payment by the principal; it merely reflects that the service was, in fact, rendered on behalf of the vessel.

The agent's principal is not identified when the services are ordered and the launch ticket is prepared. The water taxi services company generally is made aware only of the vessel name and of the agent's name. However, vendors, such as Port Ship, may have independent sources from which to determine a principal's identity. Raymond G. Wilhoft, Jr., Treasurer of Port Ship, testified that he regularly contacts principals directly in order to solicit business. Furthermore, it is common knowledge in the port that certain shipping lines are owned by a particular principal. Even if a vendor does not have prior personal knowledge of a principal's identity, a vendor is

free to contact an agent, such as Norton, Lilly, twenty-four hours a day, seven days a week, for such information. Moreover, there are numerous authoritative texts a vendor might consult to ascertain the identity of a principal. For example, *Lloyd's Register of Shipping*, *Lloyd's Shipping Index*, the *Greek Ship-owner's Register*, and the *Record of the American Bureau of Shipping*, are all commonly used listings of vessel owners in the trade. These sources, however, are not flawless; there have been instances when they have been inaccurate or out-of-date. Nor does any text purport to provide an authoritative listing of charterers, which would be a challenge of Sisyphean proportions. The fact remains that without a great expenditure of effort, a vendor could identify a principal at the time the water taxi service was ordered, through personal knowledge or simple research, especially if that principal were a vessel owner, rather than a charterer.

There was conflicting testimony presented at trial as to whether a vendor depends upon an agent's credit for payment, or on that of the vessel owner or charterer. Plaintiff's witnesses testified that it is the custom in the port for vendors to depend upon the agent's credit, thus rendering the agent a guarantor of payment. Whereas, defendant's witnesses predictably testified that the agent merely operates on behalf of the principal, upon whose credit a vendor relies. This dispute obscures the central issue, which is that it is well-known throughout the port that the *principal*, and not the agent, is ultimately responsible for payment.

Prior to 1984, it had been Norton, Lilly's custom to accept invoices from vendors addressed to Norton, Lilly. In order to eradicate any lingering misconceptions as to

the party ultimately responsible for services rendered to the vessel, Norton, Lilly sent a letter to its vendors, including Port Ship, on March 15, 1984, requesting that all invoices be addressed as follows:

> PRINCIPAL NAME AND/OR VESSEL NAME C/O NORTON, LILLY & COMPANY, INC. AS AGENTS

Vendors were warned that improperly addressed invoices would be returned for correction. Defendant's Exhibit #19. Accordingly, all invoices sent to Norton, Lilly by Port Ship after that date are addressed in the proper manner.

The procedure by which Norton, Lilly is paid by the principal, and in turn pays the vendors, is indicative of the relation between the parties. When Norton, Lilly is first hired to represent a principal, it estimates the total amount of expenses to be incurred by the vessel in port, from which it calculates its fee. The principal then advances a lump sum to cover all expected expenses, including Norton, Lilly's fee. The principal may earmark funds for specific services. More commonly, it is the agent which disburses funds to vendors, with priority given to pilotage and dockage fees, for example. Typically, extra funds are needed for unanticipated expenses. This often occurs in the case of water taxi charges, because the agent generally receives the invoices after the vessel has left the port. Norton, Lilly actively seeks payment for these unpaid services from its principal, and pays the vendor when and if any funds are received. When Norton, Lilly encounters difficulty in securing payment, the vendor is notified, and reminded that the vendor will be paid only after the funds have been sent by the principal. During

the pendency of this litigation, Port Ship has received over $900.00 from Norton, Lilly as payment from principals for services at issue in this suit. Furthermore, when requested, Norton, Lilly provide the principal's name and address to any vendor seeking payment. At its request, Port Ship has been given the names of Norton, Lilly's principals, so that Port Ship may seek payment directly.

CONCLUSIONS OF LAW

The Court is in agreement with Port Ship that the decision in *Port Ship Service v. International Ship Management*, 800 F.2d 1418 (5th Cir. 1986), is controlling. In that case, Port Ship had sued two different ship's agents in two consolidated cases, for water taxi services. The district court tried the first case, against International Ship Management, and held in favor of the maritime agent, finding that the agent had sufficiently disclosed the identity of its principal by providing Port Ship with the vessel name. In the second case, the district court granted summary judgment to Astral International Shipping Services, Inc., the maritime agent, for the same reason. In *Port Ship*, the Fifth Circuit considered only the question of whether Port Ship had sufficient notice of the identities of the principals at the time of the transactions. The Court remanded the case for further factual findings on this issue. However, no further proceedings were conducted in the matter.

The Fifth Circuit, in its analysis of the law of agency, consulted *The Restatement (Second) of Agency*, which provides that "an agent is liable as a party to the contract when the other party has notice that the agent is or may

be acting for a principal, but the other party has no notice of the principal's identity." *Restatement (Second) of Agency*, §§4(2), 321. The agent is then regarded as acting for a partially disclosed principal. *Id.* at 4(2). 800 F.2d 1420-21. "Since the vessel is not the principal", the Court determined that "Astral and International Ship did not disclose the identity of the principal by naming the vessels for which the services were to be provided." 800 F. 2d at 1421.

> *The Restatement* makes it clear that it is the agent's duty to disclose the principal's identity, not the third party's duty to ascertain that identity. *Orient Mid-East Lines v. Albert E. Bowen, Inc.*, 458 F. 2d 572 (2d Cir. 1972). A third party, such as Port Ship, however, need only receive *notice* of the identity of the principal, which may come from any source. *Restatement* at §4, Comment (d). Furthermore, the identity of the principal can be sufficiently disclosed even when the third party has no actual knowledge of it; "the [third party] has notice of the existence or identity of the principal if he knows, has reason to know, or should know of it, or has been given a notification of the fact." *Lubbock Feed Lots, Inc. v. Iowa Beef Processors*, 630 F. 2d 250, 275-76 (5th Cir. 1980) (quoting *Restatement* at §4(2), Comment (a)).

Port Ship, 800 F.2d at 1421.

This Court concludes that Norton, Lilly "satisfied [its] duty to provide notice of the identities of the principals by giving Port Ship sufficient information so that Port Ship knew, or should have known, or had reason to know, through any other source, the principals' identities." *Id.* Norton, Lilly has been careful throughout its dealing with Port Ship to maintain its position that it acts

merely as a conduit for payment by the principal, and does not act as a guarantor of payment. In order to preserve good relations in the port, Norton, Lilly actively seeks payment for unpaid vendors at considerable cost, and assists vendors in securing payment directly from principals. Moreover, through personal knowledge, and simple research, Port Ship could easily ascertain the identity of Norton, Lilly's principals.

Having disposed of the matter by determining that Norton, Lilly sufficiently disclosed the identities of its principals, the Court refrains from considering the remaining issues under contention, such as that of the propriety of marine insurance and message surcharges, and the applicability of laches as a defense to a large number of the invoices.

Norton, Lilly has filed a counterclaim for attorneys fees under Rule 11 of the Federal Rules of Civil Procedure, therein alleging that "plaintiff has arbitrarily, capriciously and without justification instituted the instant litigation against Norton, Lilly & Company, Inc." Counterclaim of Norton, Lilly, ¶4, p. 4. Considering the recent opinion in *Port Ship Service v. International Ship Management*, Port Ship had a strong basis for a good faith argument that Norton, Lilly had not sufficiently disclosed its principals. There was room for well-intentioned disagreement among the parties, because the district court did not proceed on remand to consider the factual issues as delineated by the Fifth Circuit. This Court concludes that plaintiff did not file suit "arbitrarily, capriciously and without justification" as contemplated in Rule 11; plaintiff filed and pursued a case it reasonably believed was well-grounded in fact and warranted by existing law. *See,*

Taylor v. Belger Cartage Service, Inc., 102 F. R. D. 172 (D.C.Mo. 1984). Accordingly, Norton, Lilly does not prevail on its counterclaim for attorneys fees.

Judgment will be entered accordingly.

New Orleans, Louisiana, this 8th day of July, 1988.

/s/ Marcel Livaudais
MARCEL LIVAUDAIS, JR.
United States District Judge

App. 15

PRESENT TRADING STATUS OF VESSELS SUBJECT OF
PORT SHIP SERVICE, INC. INVOICES DATED PRIOR TO APRIL 24, 1984

ID.	INVOICE	DATE	AMOUNT	VESSEL	COMPANY	OWNER/CHARTERER	PRESENT TRADING STATUS
A)	9337	2/25/81	$ 1,683.00	HARRIS	Caprice Shipping	Charterer	Broken up
B)	14793	7/24/81	264.00	NAWEZA	Navlos Maritime Co.	Owner	Renamed CEYLION
C)	14798	7/23/81	330.00	CORDIALITY	Texas Transport Terminal (TTT)	Charterer	Trading
D)	12862	8/5/81	110.00	CORDIALITY	Texas Transport Terminal (TTT)	Charterer	Trading
E)	15612	9/4/81	220.00	WILMINA	Texas Transport Terminal (TTT)	Charterer	Renamed DARA
F)	19529	2/22/82	1,991.00	ANDROMEDA	Ocean Freighters, Ltd.	Charterer	Broken up
G)	21189	5/4/82	1,927.75	CASTOR	Richmond Maritime Corp.	Charterer	Trading
H)	24259	8/17/82	121.00	ELIZABETH RUTH	Cape Lines, Ltd.	Charterer	Renamed PRO AMERICANA
I)	24840	9/29/82	110.00	ITTERSUM	Oostree	Charterer	
J)	24937	10/4/82	121.00	ALUDRA	Cape Lines, Ltd.	Charterer	Renamed ACHILLEUS
K)	26510	10/21/82	302.50	ARGYLE*	Trans-Asiatic Oil Ltd., S.A.	Owner	Broken up
L)	25310	10/23/82	242.00	SARONIKOS	Cape Lines, Ltd.	Charterer	Renamed CERVINA II
M)	26295	12/14/82	3,349.50	ARCADIAN STAR	Arkadiki Maritime, S.A.	Owner	Broken up
N)	27969	2/27/83	3,448.50	IPPOLITOS	N. J. Andriopoulos Shipping & Commercial Enterprises, S.A.	Owner	Renamed RIO HAFIL
O)	29421	5/1/83	242.00	YPATIA HALCOUSSIS	A. Halcoussis & Co.	Owner	Renamed PAMIT
P)	30017	5/14/83	4,763.00	LENDOUDIS KIKI	Evalend Shipping Co., S.A.	Owner	Broken up
Q)	30077	5/19/83	220.00	YPATIA HALCOUSSIS	A. Halcoussis & Co.	Owner	Renamed PAMIT
R)	30465	6/18/83	380.00	KORDUN	Gulf & Eastern	Charterer	Trading
S)	31160	7/7/83	1,476.75	TITIPOR	A. Halcoussis & Co.	Owner	Renamed IVER HAWK
T)	31966	8/26/83	11.00	IBN KHOALBOUN	Compagnie Nationale Algerienne de Navigatione (CNAN)	Owner	
U)	33380	10/26/83	440.00	CAPE RODNEY	Hansen & Tideman, Inc.	Charterer	Renamed CHL INNOVATOR
V)	35819	2/26/84	242.00	PROSPERIDAD	Showa Line, Ltd.	Owner	Trading
	TOTAL		$21,995.00				

TOTALS:

BROKEN UP	$12,089.00
RENAMED	6,795.25
BROKEN UP OR RENAMED	$18,884.25
TRADING	$ 2,989.75

*Amount not due according to Norton, Lilly's records.

6753a

PESCAD-Laguna, N. J.
EXHIBIT
RECORD
EXCERPT 1.0

DEFENDANT'S
EXHIBIT
1

EXHIBIT

RECORD
EXCERPT 12

LLOYD'S REGISTER OF SHIPPING FOUNDED 1760

REGISTER OF SHIPS
1984-85

H-O

PLAINTIFF'S EXHIBIT 5

LAW LIBRARY OF LOUISIANA
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W. T. Leadbetter
Secretary
July 1985

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EXHIBIT

RECORD
EXCERPT 11

PLAINTIFF'S EXHIBIT 6

PHELPS, DUNBAR, MARKS, CLAVERIE & SIMS
COUNSELLORS AT LAW

Texaco Center
400 Poydra Street
New Orleans, Louisiana 70130-3245
(504) 566-1311

October 21, 1986

BY HAND

480-57

Randall A. Smith, Esq.
Stone, Pigman, Walther,
Wittmann & Hutchinson
546 Carondelet Street
New Orleans, LA 70130-3588

Re: Fairtrade Chartering, Ltd. – M/V TRANSOCEAN PIONEER – Claim by Port Ship Service, Inc.

Dear Randy:

Further to Paul O'Brien's letter of October 16, 1986, we enclose herewith copies of the official registry documents for the M/V TRANSOCEAN TRANSPORT II and the M/V OROMONTE reflecting Universal Harmony (Panama) S.A. and Eurona (Panama) S.A., respectively, as the registered owners. We also enclose for your review pertinent extracts from the List of Entered Ships for The London Steam-Ship Owners Mutual Insurance Association Limited and The Britannia Steam Ship Insurance

Association Limited. You will note that while the TRANSOCEAN TRANSPORT II and the OROMONTE were entered with The London Steam-Ship Club for P&I risks, the M/V TRANSOCEAN PIONEER was entered with The Britannia Steam Ship Club for said risks.

Without wishing to belabor the obvious, the owners and P&I underwriters of the TRANSOCEAN PIONEER at the time of issuance of the writ of foreign attachment were not the same as the owners and P&I underwriters of the TRANSOCEAN TRANSPORT II or the OROMONTE. Inasmuch as the writ of foreign attachment was improperly issued, we would again call on your clients to dismiss the instant action against the TRANSOCEAN PIONEER.

Randall A. Smith, Esq. 480-57
October 21, 1986
Page 2

Confirming our telephone conversation of October 20, 1986, we will be filing a contested motion (with appropriate memorandum in support thereof) to amend our answer, substitute Dateline (Panama) S.A. as the proper claimant, and file a counterclaim against Port Ship Service, Inc. for wrongful attachment. Inasmuch as you have advised that your clients are refusing to grant their consent to the filing of the above pleadings, we intend to seek sanctions in the form of attorney's fees and costs for having to file same. We would remind you that Rule 15 of the Federal Rules of Civil Procedure provides in pertinent part that " . . . leave [to amend pleadings] shall be freely given when justice so requires."

Finally, reiterate our view that this matter should be settled by our respective clients in order to avoid any further litigation expenses. We would welcome your thoughts in this regard by noon on Wednesday, October 22, 1986.

With kindest regards, we remain

Very truly yours,

PHELPS, DUNBAR, MARKS, CLAVERIE & SIMS

By:/s/ Christopher O. Davis
Christopher O. Davis

124/pw/3008a
Enclosures

P.S. Since dictating the above letter, we have been advised that at one point in time the TRANSOCEAN PIONEER, TRANSOCEAN TRANSPORT II and OROMONTE were bareboat chartered to the same Philippine corporation, presumably, Transocean Transport Corp. However, we are further advised that at no time was the TRANSOCEAN PIONEER owned by the above Philippine corporation.

/s/ C.O. Davis
C.O. Davis